

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE LARRY R. HICKS, SENIOR DISTRICT JUDGE
4 ---o0o---

4 James O'Doan, : No. 3:17-cv-293-LRH-VPC
5 :
6 Plaintiff, :
7 : November 16, 2017
8 -vs- :
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10 City of Reno, Joshua : United States District Court
11 Sanford, Cade Leavitt, : 400 S. Virginia Street
12 : Reno, Nevada 89501
13 Defendants. :
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01:12:13 1 Reno, Nevada, Thursday, November 16, 2017, 1:30 p.m.

01:12:29 2 ---OoO---

01:13:05 3

01:15:14 4 THE COURT: Good afternoon. Have a seat please.

01:32:53 5 THE CLERK: Today is the date and time set for
01:32:56 6 hearing on defendant's Motion to Dismiss, document number 10
01:32:59 7 in civil case number 3:17-cv-293-LRH(VPC), James O'Doan versus
01:33:05 8 Joshua Sanford, et al.

01:34:50 9 Counsel, can you please state your appearances for
01:34:52 10 the record.

01:34:52 11 MR. BUSBY: Good afternoon, Your Honor.
01:34:54 12 Appearing for plaintiff, James O'Doan, this is Luke Busby.

01:34:58 13 THE COURT: Welcome to the courtroom.

01:34:59 14 MR. BUSBY: Thank you, Your Honor.

01:35:00 15 MR. HUGHS: Good afternoon, Your Honor. Deputy
01:35:01 16 City Attorney Mark Hughs for the City of Reno and Officers
01:35:05 17 Sanford and Leavitt.

01:35:06 18 THE COURT: Welcome to you as well. I
01:35:09 19 appreciate having you both here. I don't think I've had
01:35:11 20 the pleasure of having you appear before me before.

01:35:18 21 I'm familiar with the motion that's been filed,
01:35:21 22 the opposition and the reply. I would tell you the one thing
01:35:30 23 I'm troubled by, that you might address in your arguments, but
01:35:34 24 I don't mean to limit your arguments either, the City, the
01:35:42 25 City's opposition focuses on a large amount of the police

01:35:47 1 reports, the emergency calls that were made, the dialogue
01:35:51 2 back and forth between REMSA, the Police Department, and
01:35:58 3 the lady at the scene, whose name I don't recall, and other
01:36:08 4 reports. And I'm troubled with a Motion to Dismiss under
01:36:12 5 12(b)(6) being dependent upon evidence that is not contained
01:36:21 6 within the plaintiff's Complaint, principally, because my
01:36:26 7 obligation is to determine whether if you accept as true
01:36:31 8 everything that's been alleged in plaintiff's Complaint and
01:36:35 9 is sufficiently specific to satisfy the various standards
01:36:41 10 that apply, much of that evidence is in opposition, or at
01:36:49 11 least inconsistent with what's been alleged in plaintiff's
01:36:52 12 Complaint.

01:36:52 13 I realize I can accept certain records, such as
01:36:58 14 public records that are routinely viewed as public records
01:37:04 15 that are not disputed in any way, but I don't think that that
01:37:07 16 extends to police reports. Police reports are, classically,
01:37:11 17 hearsay. They're not, classically, public records in the
01:37:16 18 sense of being matters of public record. So for that
01:37:20 19 reason, I'm troubled over the issues in the motion. I
01:37:26 20 understand -- I anticipate what each side is going to argue
01:37:31 21 as a result of the pleadings that have been filed but,
01:37:34 22 essentially, what's being presented to the Court is a Motion
01:37:41 23 For Summary Judgment before there's been any discovery in the
01:37:45 24 case, and without any -- I shouldn't say without any, but not
01:37:54 25 based upon the actual evidence in the case.

01:37:58 1 So, that's troubling me with this particular
01:38:01 2 motion. On the other side of the coin, I would say this, that
01:38:07 3 virtually everything that I've seen filed would be admissible
01:38:10 4 for purposes of trial, for purposes of summary judgment.
01:38:16 5 Maybe I shouldn't make it that much of a blanket admissibility
01:38:20 6 without hearing any opposition that might be made, but I can
01:38:26 7 tell you that in my experience most of that evidence that I
01:38:30 8 see is, classically, presented with motions for summary
01:38:34 9 judgment. And then if the motion is not successful in some
01:38:38 10 respect, that's the evidence that tends to be presented at
01:38:44 11 trial, which tends to be in dispute, and it's up to, of
01:38:48 12 course, the Court or the jury to decide the disputed evidence.

01:38:52 13 But, that's what's troubling me at this point in
01:38:55 14 time. I feel like I'm being handed the whole case here on the
01:39:00 15 merits. I think both sides -- I don't see anything to suggest
01:39:04 16 that anyone is not citing what is actually in the record,
01:39:08 17 and I sense that there's probably not as much of a dispute
01:39:12 18 concerning specifics, state of mind and so forth, and the
01:39:17 19 degree of Mr. O'Doan's disability, are clear questions of
01:39:26 20 fact that can't be resolved simply by looking at the pleadings
01:39:30 21 and the states of mind of the officers too. You can make
01:39:37 22 inferences from what you read and see, but you actually need
01:39:42 23 see and hear witnesses or have qualified evidence presented
01:39:44 24 to you, I don't consider the police reports are the kind of
01:39:49 25 public records that -- unless both sides agree that they could

01:39:53 1 be considered by the Court -- are properly considered in a
01:40:00 2 12(b) Motion to Dismiss.

01:40:02 3 So, that's what I'm troubled about. I just thought
01:40:05 4 I'd give you a heads up on it. It's clear to me that there's
01:40:09 5 a lot that's involved from both sides in this case. And it's
01:40:15 6 interesting and I welcome you to argue the motion. I'm happy
01:40:20 7 to hear what you have to say.

01:40:22 8 So, Mr. Busby, do you want to go ahead?

01:40:25 9 MR. HUGHS: Your Honor, it was the City's
01:40:26 10 motion.

01:40:27 11 THE COURT: Oh, I'm sorry. I got so busy
01:40:32 12 focusing on the evidence I confused who is the moving party.

01:40:35 13 But it's you, Mr. Hughs and you're up. You're
01:40:38 14 welcome to go forward.

01:40:40 15 MR. HUGHS: Thank you, Your Honor.

01:40:47 16 Your Honor, I fear that I'm going to tread a little
01:40:52 17 bit where the Court expressed its concerns, although I suspect
01:40:59 18 that the parties would agree that the exhibits to the motion,
01:41:03 19 to the City's motion can be discussed today because, in
01:41:06 20 fact, before the hearing started, I saw Mr. Busby preparing
01:41:10 21 to present some of them to the Court in this matter.

01:41:15 22 I'd also point out for Your Honor, and the Court is
01:41:18 23 obviously aware, you know the law that the Court may consider
01:41:22 24 publically -- public -- judicially noticeable documents in a
01:41:29 25 Motion to Dismiss. But I think what's also important here is

01:41:32 1 a portion of the basis for the Motion to Dismiss is qualified
01:41:36 2 immunity. And there's a longstanding precedent that qualified
01:41:41 3 immunity is a matter that should be taken up early in a case,
01:41:45 4 before too many proceedings have occurred. And that's another
01:41:49 5 reason why I think it's important to have the Court consider
01:41:52 6 those documents.

01:41:54 7 Police reports are routinely requested, and so
01:41:57 8 police reports, I think, are rightfully considered a public
01:42:03 9 document. And I believe both parties are going to probably
01:42:07 10 address them. I can't guess as to --

01:42:09 11 THE COURT: Well, let me suggest that both
01:42:11 12 parties are free to refer to those public, what are perceived
01:42:18 13 to be public documents, reserving objection on behalf of
01:42:23 14 either side who would be objecting to that at some later time.
01:42:27 15 I want to hear your arguments. It helps for me to become
01:42:31 16 completely familiar with the case as well. And so you're
01:42:36 17 free to refer to those, even though I've expressed whether
01:42:40 18 I consider -- whether I can consider them for purposes of
01:42:43 19 your motion, Mr. Hughs.

01:42:45 20 MR. HUGHS: Thank you, Your Honor. And I
01:42:46 21 suspect I won't be referring to them a great deal, other
01:42:50 22 than generally in regard to the motion.

01:42:52 23 Your Honor, this is a 12(b)(6) motion, a motion,
01:42:55 24 basically, arguing that the plaintiffs have failed to state
01:42:58 25 a claim upon which they can seek relief. The City's basic

01:43:05 1 concern is that the entire motion is the "after the fact" type
01:43:09 2 of reasoning prohibited by Graham versus Conner. In other
01:43:13 3 words, the Complaint is based upon a review of circumstances
01:43:18 4 not as they existed at the time and as the officers
01:43:21 5 encountered them -- which is why we felt it was important
01:43:24 6 for the Court to see some of the public records concerning
01:43:27 7 what the officers knew at the time -- but that, instead, the
01:43:31 8 plaintiffs are presuming knowledge that goes beyond what the
01:43:34 9 officers knew at the time. And in fact, I anticipate that
01:43:41 10 plaintiffs are even going to go so far, today, Your Honor,
01:43:44 11 as to try to present evidence which isn't even part of the
01:43:47 12 briefing or the motions at all, but that has occurred because
01:43:50 13 discovery is ongoing at this point in time. And that I would
01:43:53 14 object to. Anything which isn't a judicially noticeable
01:43:58 15 public document, I would object to the Court's consideration.

01:44:00 16 Your Honor, the plaintiff's basic argument, or
01:44:05 17 basic premise of their case here -- and there's only one
01:44:09 18 claim against the City, by the way, just an ADA or Americans
01:44:13 19 with disabilities claim. All the other claims are civil
01:44:16 20 rights claims and/or state tort claims against one or more
01:44:19 21 of the officers. The basic premise is the City must have
01:44:23 22 violated the Americans with Disabilities Act because its
01:44:28 23 officers arrested a man with epilepsy, and that the officers
01:44:32 24 must have violated civil rights because they arrested a man
01:44:35 25 with epilepsy. But, Your Honor, as you're familiar with the

01:44:40 1 briefs, the ADA does not prohibit arrests of someone with
01:44:44 2 epilepsy, where it's objectively reasonable under the totality
01:44:48 3 of circumstances to do so.

01:44:50 4 I'd also point out, and this is most certainly a
01:44:53 5 public record, the justice court record that is included in
01:44:56 6 the Motion to Dismiss, that probable cause for the arrest
01:44:59 7 was found by the justice court, and so that raises the specter
01:45:05 8 of issue preclusion. In other words, the plaintiffs can't
01:45:08 9 relitigate that issue. It's already been found by a court to
01:45:11 10 exist. And that's under Five Star Capital Corporation versus
01:45:18 11 Ruby, which is 124 Nevada 1048; 194 P.3d 709.

01:45:27 12 MR. BUSBY: Your Honor, just for the record, I
01:45:29 13 would like to lodge an objection. That argument being beyond
01:45:33 14 the scope of what was argued in the briefs.

01:45:35 15 THE COURT: All right. I'll note the objection.
01:45:36 16 Go ahead, Mr. Hughs.

01:45:38 17 MR. HUGHS: Okay. And Your Honor, I think it's
01:45:39 18 appropriate for this hearing to be able to argue the law
01:45:42 19 beyond the briefs, otherwise we wouldn't need to be here.

01:45:45 20 But for that reason, where probable cause was found,
01:45:48 21 that cannot be relitigated, and so certain claims are knocked
01:45:54 22 out by the fact that where probable cause exists, you cannot
01:45:57 23 have a 1983 unlawful seizure claim; you cannot have a state
01:46:02 24 law false arrest claim; you cannot have a state court false
01:46:06 25 imprisonment claim because the Court, the justice court in the

01:46:10 1 State of Nevada found probable cause exists. So as to those
01:46:15 2 claims, right there, they're knocked out by the fact that
01:46:18 3 probable cause was found and we don't get to relitigate. We
01:46:21 4 don't allow one court the second -- to retry what another
01:46:26 5 court did.

01:46:26 6 So the real issue here, then, Your Honor, is
01:46:31 7 the allegations have to raise more than a possibility that
01:46:33 8 the defendants acted unlawfully. And with the arguments
01:46:38 9 we provided, and the information and judicially noticeable
01:46:43 10 documents with the motion, we believe the motion demonstrates
01:46:46 11 that police were called because medical providers had
01:46:51 12 encountered a violent and uncooperative man. He appeared
01:46:55 13 to be breaking the law. He reacted to the police in a -- with
01:46:59 14 a threatening gesture when they approached him. And, he posed
01:47:03 15 a danger to himself and those around him. Under the totality
01:47:07 16 of circumstances, it was reasonable for the police to arrest
01:47:11 17 Mr. O'Doan.

01:47:12 18 And that basically boils down what's going on here,
01:47:15 19 Your Honor. Under those circumstances, it doesn't matter
01:47:19 20 whether Mr. O'Doan is an epileptic or not. What the police
01:47:23 21 knew at the time -- and the motion has a timeline in it. It
01:47:28 22 indicates, for instance -- call histories were provided, but
01:47:33 23 it wasn't until 6:55 that police officers were called. So at
01:47:37 24 that point in time, REMSA had already responded, the Reno Fire
01:47:43 25 Department had already responded. They were both staging,

01:47:46 1 waiting for law enforcement, because -- and the record
01:47:49 2 reflects this -- in fact, the call log, which is Exhibit 5
01:47:53 3 to the motion, records not word for word what's in the
01:47:57 4 recordings, but some of what was reported, that Mr. O'Doan
01:48:03 5 was violent, uncooperative, hurting himself, had torn up his
01:48:09 6 house, and was trying to break out of his house. That's a
01:48:13 7 person where law enforcement needs to step in because medical
01:48:17 8 responders aren't going to provide him with medical relief
01:48:20 9 until he's under control.

01:48:21 10 And once he did break out of his house, and the
01:48:24 11 police encountered him after he was walking down the street
01:48:28 12 naked on Kietzke Lane, on a summer night, with, by the way a
01:48:33 13 contingent of fire and REMSA, you know, basically following
01:48:38 14 along Kietzke Lane trying to stay with Mr. O'Doan, there was
01:48:44 15 a danger to himself, to all those responders, and to anybody
01:48:47 16 else on Kietzke Lane, you know, especially if Mr. O'Doan had
01:48:51 17 decided to just walk out into the street, or encountered a
01:48:55 18 bunch of children, we don't know what would have happened.

01:48:57 19 What we do know is when the police encounter him, he
01:49:00 20 turned around, made a threatening gesture. In other words, he
01:49:04 21 responded to the police. He did not appear to be in the fits
01:49:07 22 of some epileptic bout at that time. So, their actions were
01:49:13 23 appropriate and reasonable under the circumstances known to
01:49:17 24 the police. That's all they knew when they arrested him and
01:49:19 25 when they detained him. There was no -- and the records will

01:49:27 1 indicate that there's no further indication that the officers
01:49:30 2 knew anything more, or that they found out anything more,
01:49:34 3 Your Honor, that would change the reason for the arrest or
01:49:37 4 the reason for charging Mr. O'Doan. And then, again, we run
01:49:41 5 into the fact that once Mr. O'Doan went to court, probable
01:49:45 6 cause was found for his arrest. So, that erases any question
01:49:49 7 about those issues right there.

01:49:54 8 So what we've got is an ADA violation, Your Honor,
01:49:57 9 against the City, based upon Mr. O'Doan's arrest. The entire
01:50:02 10 premise of the Complaint with that allegation is if he was
01:50:06 11 arrested, there must be an ADA violation there. But, that's
01:50:10 12 not the case. You can arrest a person with epilepsy. And
01:50:14 13 under the circumstances, it was appropriate to do so.

01:50:16 14 The excessive force claim against Officer Sanford,
01:50:20 15 again, under the totality of circumstances, it was reasonable
01:50:23 16 for him to use hands on -- and that's all he used was hands
01:50:27 17 on force to detain Mr. Sanford. -- excuse me -- Mr. O'Doan.
01:50:32 18 The fact that Mr. O'Doan fought back, resisted, and injured
01:50:36 19 himself in the process, is really beyond the police control,
01:50:40 20 but that's, yet, another reason why it was appropriate for
01:50:44 21 them to take him down.

01:50:45 22 The unlawful seizure, again, probable cause finding
01:50:48 23 deletes that claim.

01:50:49 24 The due process claim is basically premised on an
01:50:55 25 allegation that Sanford and Leavitt did not put in their

01:51:00 1 probable cause statement the fact that Mr. O'Doan was an
01:51:02 2 epileptic. But, there was never any confirmation of that.
01:51:06 3 And there's nothing in the Complaint or in any public record
01:51:09 4 that will indicate there was a confirmation of epilepsy. And
01:51:14 5 again, he then went to Court where probable cause was found
01:51:17 6 for the arrest. If that was the case, I think there would be
01:51:20 7 a concern there.

01:51:21 8 I would also note, though, Your Honor, they
01:51:24 9 didn't put that he was violent or breaking out of his house
01:51:27 10 or uncooperative -- I think "uncooperative," the word was in
01:51:33 11 there, but they didn't use every word that was told to them
01:51:36 12 on the call in their probable cause statement, and that does
01:51:39 13 not create a due process claim.

01:51:41 14 With regard to the assault and battery, which is
01:51:44 15 just a State tort claim, Your Honor, again, it was reasonable
01:51:47 16 for the officers to do what they did. And I think even
01:51:50 17 the plaintiffs had conceded in their opposition that the law,
01:51:55 18 essentially, is the same for the State tort claim, as it
01:51:58 19 would be for on excessive force claim, Your Honor. If it
01:52:01 20 was reasonable under the circumstances to use the force they
01:52:04 21 did and detain Mr. O'Doan, then it was proper to take him
01:52:09 22 down in the manner they did. And I think it's important
01:52:11 23 to note that the police had, obviously, other tools, other
01:52:16 24 weapons available to them, but they just went hands on with
01:52:20 25 Mr. O'Doan. They tried to use a taser, it didn't work, but

01:52:24 1 they just went hands on with Mr. O'Doan. They didn't do
01:52:27 2 anything more severe. They didn't beat him with a baton.
01:52:31 3 They didn't use any other weapons of that nature.

01:52:34 4 So, Your Honor, the bottom line is when you look
01:52:36 5 at the Complaint with the information which the Court can
01:52:40 6 review, especially when qualified immunity is at issue, as
01:52:44 7 it is with these civil rights claims, the plaintiff doesn't
01:52:47 8 state a plausible claim for relief. There is -- he cannot
01:52:51 9 support a cognizable theory of liability here. A claim
01:52:55 10 is not plausible, Your Honor, where there is a reasonable,
01:52:59 11 alternative explanation for what happened.

01:53:03 12 THE COURT: All right.

01:53:03 13 MR. HUGHS: Thank you, Your Honor.

01:53:04 14 THE COURT: Thank you, Mr. Hughs.

01:53:05 15 Mr. Busby.

01:53:06 16 MR. BUSBY: Thank you, Your Honor.

01:53:16 17 If it please the Court, I have a few PowerPoint
01:53:19 18 slides that I would like to use to help guide you through my
01:53:23 19 presentation. And, it's, actually, mostly for me, to help me
01:53:26 20 guide me through my presentation.

01:53:28 21 Your Honor, this case, the factual genesis of this
01:53:31 22 case is Mr. O'Doan's girlfriend, April O'Fria calling 911,
01:53:37 23 responding to Mr. O'Doan, clearly, having a very severe
01:53:41 24 seizure. He's an epileptic. He's known to be an epileptic.
01:53:46 25 He's subject to these horrific seizures from time to time.

01:53:50 1 And listening to Exhibit 1 to the motion, Exhibit 3 to the
01:53:53 2 motion, Exhibit 4 to the motion, and exhibit 6 to the motion,
01:53:57 3 this fact is made perfectly clear.

01:53:58 4 Mr. O'Doan had a seizure in the shower. That's
01:54:02 5 why he was naked. After he has a seizure, he goes into a
01:54:06 6 postictal state. He's, basically, not conscious. His
01:54:10 7 girlfriend, aware of what happens after he has a seizure,
01:54:13 8 calls 911, is terrified that the police are going to attack
01:54:17 9 them, informed them over and over again, please let them
01:54:21 10 know he's an epileptic. He's having a seizure. He needs
01:54:24 11 medical attention. Last time, the cops beat him up because
01:54:28 12 they didn't listen to them.

01:54:30 13 Now, that raises the question did the police know
01:54:33 14 before encountering Mr. O'Doan what the situation was? And
01:54:36 15 the answer to that question is yes. The logs from the 911
01:54:39 16 call in Exhibit 5 to the motion, clearly show that that's
01:54:43 17 the case. And it's alleged in the Complaint, that the Court
01:54:47 18 accepts that fact at true. It's -- it's a fundamental bedrock
01:54:54 19 fact for Mr. O'Doan's case.

01:54:56 20 Other central operative facts in the case that are
01:54:59 21 important, Sanford and Leavitt were advised that O'Doan was an
01:55:07 22 epileptic. Sanford's own report describes the extent of the
01:55:12 23 use of force on Mr. O'Doan. He describes, essentially, Judo
01:55:16 24 throwing Mr. O'Doan and he states that --

01:55:17 25 MR. HUGHS: Your Honor, I will object. There is

01:55:19 1 no -- well, I won't. I'll strike that. Excuse me.

01:55:25 2 MR. BUSBY: And that Mr. O'Doan, the Judo throw
01:55:27 3 caused him to suffer injuries to his head.

01:55:30 4 O'Doan was transported via ambulance to Renown. The
01:55:33 5 ER doctor at Renown diagnosed him with having had a seizure.
01:55:38 6 He informed Sanford and Leavitt about this fact. And after
01:55:42 7 even knowing what occurred, the officers decided to arrest
01:55:46 8 him anyway. They never did mention the true facts and
01:55:50 9 circumstances in any of their reports.

01:55:53 10 So in the City's arguments, which the Court is
01:55:57 11 familiar with, basically create straw man arguments, arguments
01:56:04 12 that we don't even make, and they attack them because they're
01:56:07 13 easier to attack than the arguments we do actually make. For
01:56:11 14 example, the City argues that the officers should ignore the
01:56:14 15 dangers and actual circumstances they encounter.

01:56:17 16 Okay. Well, what are the actual circumstances?

01:56:18 17 They were told this is an epileptic who is having a
01:56:21 18 seizure, before they even got there. So, they knew that.

01:56:25 19 O'Doan was diagnosed with having a seizure by
01:56:27 20 Dr. Di Rocco at Renown. The whole point of the 911 call was,
01:56:34 21 hey, this person is having a seizure. If you listen to the
01:56:34 22 calls back and forth between REMSA, the Fire Department, and
01:56:36 23 the police, that's what the discussion is about: This guy is
01:56:39 24 postictal. He's violent. Right? He's uncooperative. He's
01:56:44 25 not in his right mind.

01:56:47 1 First responder medical personnel know what that
01:56:49 2 means. If the police didn't know what that means, then that
01:56:52 3 supports our ADA claim. At a minimum, they knew he was
01:56:55 4 epileptic. And I think it's common knowledge that everybody
01:56:58 5 knows that epileptics have seizures.

01:57:02 6 Sanford was provided with O'Doan's discharge papers
01:57:05 7 from Renown, which very clearly state, you know, he's got
01:57:08 8 abrasions, he's got injuries, and he had a seizure. But, they
01:57:11 9 arrested him anyway.

01:57:12 10 Now --

01:57:13 11 MR. HUGHS: Your Honor, I will object. I don't
01:57:15 12 believe that the Complaint alleges he was provided with
01:57:17 13 discharge papers.

01:57:20 14 MR. BUSBY: Your Honor, if I may. Just one
01:57:22 15 moment.

01:57:24 16 THE COURT: All right.

01:57:52 17 MR. BUSBY: Well, Your Honor, O'Doan got
01:57:54 18 from Renown, via the Reno Police, and the police were provided
01:57:58 19 with his discharge papers. And that's been established in
01:58:02 20 discovery subsequent to the filing of the motion --

01:58:05 21 MR. HUGHS: Which is basis for my objection,
01:58:07 22 Your Honor.

01:58:08 23 MR. BUSBY: Okay. Well, Title II of the ADA
01:58:11 24 requires public entities to take disability into account when
01:58:15 25 making -- when interacting with disabled persons, essentially.

01:58:19 1 The basis for our ADA claim is that Leavitt Sanford
01:58:23 2 discriminated against O'Doan by assaulting and battering
01:58:26 3 him, even though they knew he was an epileptic, and charging
01:58:31 4 him with a crime that is purely a result of him having this
01:58:34 5 disease. It's not the result of a conscious action his part.

01:58:39 6 And, what's also become apparent is that the City
01:58:41 7 of Reno, in its capacity as policy-maker, completely failed to
01:58:44 8 train these first responders to recognize the symptoms of this
01:58:48 9 disability, of epilepsy. Title II of the ADA requires them to
01:58:52 10 do that. It requires them to make reasonable modifications to
01:58:55 11 their policies when they're dealing with a disabled person.
01:58:58 12 You don't -- the example that I used in the opposition of the
01:59:01 13 motion is you don't shoot a paraplegic for failing to raise
01:59:06 14 his hands in response to a police officer commanding him to
01:59:09 15 do so.

01:59:09 16 It's not logically possible for O'Doan to respond to
01:59:13 17 the commands of the police when he's in a postictal state.
01:59:16 18 He's not in control. And the evidence in this case is going
01:59:18 19 to prove that unequivocally.

01:59:21 20 Now, the City argues that we haven't made a
01:59:24 21 cognizable claim. Well, the case law clearly shows that
01:59:28 22 that's not the case. The Ninth Circuit in Sheehan (phonetic)
01:59:32 23 versus San Francisco, as an issue of first impression,
01:59:35 24 unequivocally said that Title II applies to arrests; meaning,
01:59:40 25 that you have to take disability into account when you

01:59:43 1 arrest someone, and you have to take disability into account
01:59:46 2 subsequent to the arrest.

01:59:48 3 Okay. So, did we allege that disability wasn't
01:59:52 4 taken into account?

01:59:53 5 Yes. If the premise of the Complaint that O'Doan
01:59:57 6 was arrested because he has epilepsy, then that would be a
02:00:00 7 de facto violation of Title II. That's the most clear example
02:00:05 8 of failing to take disability into account that I can think
02:00:08 9 of.

02:00:09 10 The Ninth Circuit, in the Sheehan decision,
02:00:13 11 specifically recognized two types of Title II ADA claims.
02:00:18 12 One for wrongful arrest, which occurred here, where police
02:00:23 13 arrest someone with a disability because they misperceive the
02:00:26 14 affects of that disability as criminal activity. Okay?

02:00:30 15 And that's -- the fact that Di Rocco, at Renown,
02:00:33 16 told them this guy had had a seizure, is, if proven true,
02:00:37 17 is, essentially, conclusive evidence of this claim; that
02:00:41 18 Mr. O'Doan was wrongfully arrested in violation of Title II
02:00:44 19 of the ADA. It also requires reasonable accommodations, where
02:00:50 20 although police properly investigate and arrest a person with
02:00:52 21 a disability, for a crime unrelated to that disability, they
02:00:55 22 fail to reasonably accommodate the person's disability in the
02:01:00 23 course of the investigation and arrest. Okay?

02:01:03 24 We're not arguing that the police shouldn't have
02:01:05 25 detained Mr. O'Doan. But according to the guidelines from

02:01:08 1 the Epilepsy Foundation, Police Best Practices, you don't use
02:01:12 2 deadly force on a sick person --

02:01:20 3 THE COURT: Well, let's be realistic here.
02:01:22 4 There's no deadly force that's obvious from anything that
02:01:25 5 you've filed in this case. I mean it, obviously, was a
02:01:28 6 hands on takeover by the police. I give you credit if you
02:01:36 7 resolve all charges in your Complaint in your favor, that
02:01:43 8 you could make a case for excessive force, if the evidence
02:01:48 9 developed that, but there's nothing in your Complaint that
02:01:52 10 shows excessive force was used by these officers.

02:01:55 11 MR. BUSBY: Your Honor, we respectfully, of
02:01:59 12 course, disagree with that. If you look at --

02:02:00 13 THE COURT: Okay. Well, tell me why you
02:02:02 14 disagree with it.

02:02:02 15 MR. BUSBY: Oh, of course. Officer Sanford's
02:02:05 16 own description of what he did to O'Doan, contained in his
02:02:08 17 report, which is attached as an exhibit to the motion, states
02:02:11 18 that he performed a reverse reap throw on O'Doan.

02:02:16 19 THE COURT: Right. And --

02:02:17 20 MR. BUSBY: Now, the reverse reap throw --

02:02:19 21 THE COURT: Well, wait. Now what's the evidence
02:02:20 22 in your Complaint of what a reverse reap throw is, and why
02:02:24 23 that would be an improper approach to take charge of someone
02:02:29 24 who is not cooperating with the police?

02:02:32 25 MR. BUSBY: Well, it's -- the allegation is that

02:02:35 1 O'Doan landed on his head after being thrown. And if you trip
02:02:40 2 someone from behind using a Judo throw technique, the way
02:02:45 3 it's been described to me, they can land right on their head,
02:02:48 4 Your Honor. And a person landing right on their head on the
02:02:51 5 concrete, when they're unaware, when they're incapacitated,
02:02:55 6 that can most certainly kill them. That's the basis for our
02:02:58 7 allegation that this was deadly force, Your Honor.

02:03:01 8 THE COURT: Okay. All right.

02:03:03 9 MR. BUSBY: Now, the Sheehan case has been to
02:03:07 10 the Supreme Court, and the Supreme Court ruled on one aspect
02:03:10 11 of the Sheehan case, the qualified immunity issue. Sheehan
02:03:14 12 involved a mentally disabled woman who pulled a knife on
02:03:18 13 the police, unfortunately, and was shot. And in that case,
02:03:22 14 the Supreme Court determined that qualified immunity applied
02:03:25 15 because it was, it was a fast moving situation. There was an
02:03:29 16 actual, like, threat to the officer. She had a knife. But
02:03:33 17 the Ninth Circuit, on the ADA claim, specifically declined
02:03:38 18 to address whether the ADA applies to arrests. And the
02:03:42 19 opinion states: "We're not going to address this issue
02:03:45 20 because nobody really briefed it. We granted certiorari
02:03:49 21 so the court could consider whether Title II of the ADA
02:03:52 22 applies to arrests. And they changed the issues on us on
02:03:55 23 the briefing, so we decline to answer that question."

02:03:58 24 As such, the Ninth Circuit's opinion, underlying
02:04:02 25 opinion on the Title II issue in the Sheehan case that the

02:04:08 1 panel issued is good law in this jurisdiction. Title II of
02:04:12 2 the ADA applies to arrests in the Ninth Circuit.

02:04:22 3 THE COURT: I give you that, but how do you,
02:04:26 4 how do you compare the facts of this case with the facts in
02:04:29 5 Sheehan, where you actually have someone, a female, who is
02:04:34 6 shot by police officers, as I recall it was at least two or
02:04:39 7 three times, at a very close range, in her own home, in her
02:04:48 8 own dwelling place? This case, seems to me, to be so far
02:04:54 9 removed Sheehan, that I have a hard time seeing how the facts
02:04:57 10 of Sheehan could be applied to this case.

02:04:59 11 MR. BUSBY: And Your Honor, I think the
02:05:01 12 distinction is between the amount of aggression that was
02:05:05 13 clearly being shown by Sheehan towards the officers, and
02:05:10 14 the fact that she was armed. That seemed to really sway
02:05:13 15 the Supreme Court's decision to grant qualified immunity.

02:05:17 16 THE COURT: But, also, the fact that the
02:05:18 17 officers broke into her apartment, her dwelling place a
02:05:22 18 second time, as I recall -- I don't recall if the first time
02:05:26 19 was by force or not, but certainly the second time was, and
02:05:29 20 that when they did that, and she approached them with a knife,
02:05:32 21 they then shot her. And my assessment of the case was that
02:05:37 22 the Supreme Court was very concerned that this happened in her
02:05:40 23 home, her living space, and that the officers chose, under
02:05:44 24 the circumstances, to break in, when their greatest concern at
02:05:48 25 that time would have been they just didn't know what was

02:05:52 1 happening inside. And, that when they did break in, the woman
02:05:56 2 approached them, and they, then, not using hands on force,
02:06:02 3 not using a taser, draw their weapons and fire and shoot at
02:06:07 4 her and, in fact, shoot her at very close range.

02:06:12 5 So, I'm just having a real problem with -- the
02:06:18 6 facts of this case here is you have someone who is out in
02:06:21 7 the public. They're not in their own living space. You
02:06:24 8 have someone who is totally nude, walking down the street in
02:06:29 9 daylight hours. He's walking down a street that heavily
02:06:33 10 trafficked, busy street, one of the main thoroughfares through
02:06:38 11 the streets of Reno. And, he's not responding to police
02:06:44 12 requests. And, he's also a great danger to himself, even
02:06:49 13 with all the medical personnel and everyone else on board
02:06:53 14 present at that scene. The officers first attempt to taser,
02:06:58 15 which didn't work -- here I'm citing evidence that I said I
02:07:02 16 wouldn't rely on, but for sake of the argument, I will -- and
02:07:08 17 when that doesn't work, one the officers uses hands on force
02:07:13 18 to take Mr. O'Shea down -- or, O'Doan, excuse me. And he is
02:07:19 19 arrested. And, apparently, no one is disputing there was
02:07:24 20 some injury inflicted -- I don't know the extent of it, But
02:07:28 21 some injury inflicted at the time he was taken down.

02:07:31 22 So, I have a real problem with applying the Sheehan
02:07:35 23 case, although the principals of law are clear in Sheehan.

02:07:40 24 MR. BUSBY: Understood, Your Honor. And I think
02:07:42 25 the distinction is what specifically happens to an epileptic

02:07:46 1 when they're in postictal state that's different than a
02:07:50 2 normal, you know, schizophrenic person acting aggressively
02:07:55 3 towards the police.

02:07:55 4 And the way I understand it, based on the literature
02:07:58 5 I've read, and my discussions with our experts that we've
02:08:01 6 retained, is that basically a seizure completely shuts down a
02:08:04 7 person's brain. They're convulsing. They're sometimes, you
02:08:08 8 know, spitting, saying things. And after the seizure, they go
02:08:12 9 into a postictal state where slowly, very slowly, full brain
02:08:18 10 function will return. But in that interim period before it
02:08:21 11 returns completely, the person can be kind of in a dream-like
02:08:26 12 state. And the proper procedure for dealing with a person
02:08:30 13 who is in that state is to, number one, you can't yell at
02:08:34 14 them because they become more frightened. And if you use
02:08:38 15 physical force against a postictal epileptic, they will,
02:08:42 16 quite commonly, become combative because they don't know
02:08:45 17 what's happening. They're terrified. Physical force is being
02:08:48 18 exerted on them, and so they respond involuntarily.

02:08:53 19 So, if an officer knows that, if an officer knows
02:08:58 20 how to deal with a postictal epileptic, approach them calmly,
02:09:03 21 don't yell at them -- basically, the Epilepsy Foundation
02:09:06 22 videos show people kind of trying to herd an epileptic, to
02:09:10 23 move them in a particular direction, rather than using force
02:09:14 24 against them. If you know what to do in that circumstance,
02:09:17 25 then the outcome can be completely different. You can avoid

02:09:22 1 injuring a person, perhaps, very gravely, who is suffering
02:09:26 2 from a medical condition only.

02:09:28 3 Now, Mr. O'Doan needed help that night. His --
02:09:31 4 there's no denying that. There's no denying that when he
02:09:35 5 was in a postictal state, you know, it's very strange for
02:09:39 6 people who encounter that. But part of the claim we're
02:09:43 7 bringing in this case under the ADA is that, look, these,
02:09:46 8 these people misperceived what was going on. Okay? And
02:09:50 9 had they been trained properly, if they knew what to do,
02:09:53 10 there's no way Sanford would have used that kind of force on
02:09:57 11 Mr. O'Doan.

02:09:58 12 THE COURT: What would he have done?

02:10:00 13 MR. BUSBY: He could have spoken to him soft --
02:10:02 14 the record indicates that, basically, they were yelling at
02:10:05 15 him. Stop. Police. And chasing after him. Which, for a
02:10:09 16 person in a postictal state, is just going to terrify them.

02:10:13 17 THE COURT: But, again, referring to the
02:10:15 18 evidence, weren't there a number of medical personnel present?
02:10:19 19 The REMSA people, who had gone on to standby because they
02:10:24 20 were unable to resolve the problem with Mr. O'Doan?

02:10:29 21 MR. BUSBY: Well, there's a question about how
02:10:32 22 this all happened. They didn't actually try to resolve it.
02:10:36 23 They never actually tried to control him. My understanding is
02:10:40 24 he was walking down Gentry Way naked. Ms. O'Fria was on the
02:10:45 25 phone following him, trying to tell the 911 operator where he

02:10:49 1 was. The Fire Department was the first EMS responder on
02:10:54 2 scene. The -- we've deposed four of the firefighters. Their
02:11:00 3 stories about what happened are, you know, inconsistent to
02:11:03 4 some extent.

02:11:04 5 But, Mr. O'Doan is walking naked. He looks like
02:11:07 6 he's -- they say he was power walking. And they said, hey,
02:11:12 7 buddy, uh, you know, what's, what's going on? And he just
02:11:15 8 looked at them and walked right past.

02:11:18 9 Now, for a postictal epileptic, for someone who
02:11:23 10 know about epilepsy, you can understand that that kind of
02:11:25 11 thing can happen. But, apparently, the firefighters didn't
02:11:29 12 recognize it for what it was either, even though the 911
02:11:32 13 operator was told over and over again by Ms. O'Fria, look,
02:11:36 14 he's having a seizure. He's having a seizure. He needs
02:11:40 15 help.

02:11:40 16 So, you know, we're not questioning that the police
02:11:43 17 had a proper role to play in this process. We're questioning,
02:11:48 18 you know, what Sanford did to O'Doan, whether that was
02:11:51 19 appropriate, given that he was suffering from a medical
02:11:54 20 condition. And under --

02:11:56 21 THE COURT: But let me come back to that
02:11:57 22 question because I kind of pulled you off of it was you were
02:12:01 23 responding. What, what, in your view, should Officer Sanford
02:12:04 24 have done, short of taking some kind of physical control of
02:12:11 25 Mr. O'Doan?

02:12:13 1 MR. BUSBY: First, he should have approached him
02:12:15 2 without yelling at him. That's number one. Because if you
02:12:18 3 yell at a postictal epileptic, you're going to terrify them.

02:12:23 4 Number two, if you can, you can herd them by
02:12:27 5 stepping in front of them, kind of directing them where to go.
02:12:30 6 And Mr. O'Doan, you know, his girlfriend has seen him have
02:12:35 7 lots and lots of seizures, and when they're not -- when he
02:12:38 8 doesn't escape the house and they're not this horrific,
02:12:42 9 she's able to do that with him. And that's what the Epilepsy
02:12:45 10 Foundation says should be done in these cases.

02:12:48 11 And if Sanford chose to take O'Doan down, he didn't
02:12:51 12 have to do it like that. He didn't have to -- a reverse reap
02:12:59 13 throw, my understanding is if someone is facing away from you,
02:13:03 14 you grab them from behind. You stick your foot in front of
02:13:07 15 their leg. And you throw them to the ground.

02:13:10 16 Now, I have some experience with that kind of thing
02:13:15 17 from doing martial arts myself, and I've -- you know, if you
02:13:21 18 throw someone who is out of it, who is having a medical
02:13:25 19 condition like that on the ground, they can be severely
02:13:29 20 injured or killed.

02:13:30 21 And so, you know, there -- Officer Sanford had
02:13:35 22 options, had he taken into account what the actual situation
02:13:39 23 was. This was an epileptic. This wasn't a lunatic criminal
02:13:44 24 who -- you know, a fleeing felon. Someone who had committed
02:13:47 25 some kind of horrific crime that was trying to get away from

02:13:51 1 the police. This was a medical call. Everybody knew that.

02:13:55 2 And so, O'Doan, you know, he's in a position where
02:13:59 3 he's terrified to call for help when he does have a seizure
02:14:04 4 because he's afraid, maybe the next time, maybe he will get
02:14:08 5 killed.

02:14:08 6 Now this case presents an opportunity for a
02:14:11 7 resolution of this issue, for the police to get properly
02:14:14 8 trained, and for the wrong that was done to him to be
02:14:17 9 recognized. That's why the excessive force case -- claim
02:14:23 10 is so important in this case, Your Honor, and the ADA claim.

02:14:26 11 THE COURT: Okay. What was the extent of the
02:14:29 12 injury to Mr. O'Doan?

02:14:31 13 MR. BUSBY: There is a litany of abrasions
02:14:35 14 and cuts that are listed on his ER report. Now Sanford is
02:14:42 15 disputing that -- how those things were caused. He says in
02:14:47 16 his reports that as a result of being thrown, Mr. O'Doan had
02:14:51 17 lacerations to his head and he was bleeding.

02:14:54 18 Apparently, after they got him, they pinned him
02:14:58 19 down face first on the ground, which is also, you know, a
02:15:02 20 big no, no for an epileptic. You can kill them if do you
02:15:05 21 that. And, he continued to struggle. So, he had abrasions
02:15:09 22 all over his body. And at the ER, they actually x-rayed his
02:15:15 23 feet because they thought his feet were broken. He suffered
02:15:18 24 pretty serious injuries to his wrists as a result of being
02:15:22 25 handcuffed because, if you try and do that to a postictal

02:15:26 1 epileptic, they're going to struggle. They have no idea what
02:15:29 2 they're doing.

02:15:30 3 So, Your Honor, does that satisfy your questions on
02:15:36 4 that point?

02:15:37 5 THE COURT: It gives me some insight. Yes.

02:15:39 6 MR. BUSBY: Okay.

02:15:41 7 THE COURT: All right. Go ahead. I'm sorry.

02:15:42 8 MR. BUSBY: That's okay.

02:15:43 9 So moving past Sheehan, Sanford's own report, you
02:15:51 10 know, describes the degree of force that was used in this
02:15:53 11 case. And this is what Mr. O'Doan looked like, as presented
02:16:02 12 in Exhibit 2, after this encounter. He's got very severe, you
02:16:06 13 know, cuts and scratches on his head.

02:16:11 14 The City argues that --

02:16:14 15 MR. HUGHS: Excuse me. My monitor isn't
02:16:16 16 working. I don't know if it is up there.

02:16:17 17 THE COURT: Yeah. No, mine is not on either.

02:16:19 18 MR. BUSBY: Your Honor, I'm just going have to
02:16:21 19 give up on this thing. It's not working. I've got it all
02:16:23 20 here.

02:16:23 21 THE COURT: Well, I'm familiar with the exhibit.
02:16:25 22 I looked at that before I came into the courtroom.

02:16:27 23 MR. BUSBY: Okay.

02:16:30 24 Now, the City argues that the use of force would
02:16:33 25 objectively reasonable. And if you go through the Graham v.

02:16:37 1 Conner factors, well, you know, the evidence can most
02:16:40 2 certainly show otherwise. And this case is actually a lot --
02:16:44 3 it's very similar to what happened in Graham v. Conner.
02:16:48 4 Dethrown Graham (phonetic), a diabetic, is having an insulin
02:16:51 5 reaction, runs into a grocery store, grabs some orange juice.
02:16:53 6 The police see him acting strange, like he's drunk. They
02:16:57 7 detain him for a period of time and rough him up. And,
02:17:02 8 eventually, they discover the truth of the situation. He's
02:17:06 9 not drunk. The orange juice, after they give it to him, takes
02:17:10 10 effect. His blood sugar returns to normal. And they let him
02:17:14 11 go.

02:17:14 12 Now, this case is even worse than that because they
02:17:17 13 didn't let Mr. O'Doan go after they figured out what was going
02:17:20 14 on.

02:17:20 15 O'Doan didn't make any verbal threats at the
02:17:23 16 officers. He wasn't armed. He made no attempt to physically
02:17:28 17 attack Sanford and Leavitt. There's going to be disputed
02:17:31 18 testimony on whether he actually turned towards Leavitt and
02:17:35 19 made an aggressive action towards him. A couple of the
02:17:38 20 firefighters testified that that didn't -- they didn't
02:17:41 21 indicate that that happened.

02:17:42 22 The nature of the call was clearly medical. It
02:17:45 23 wasn't a domestic violence call. Ms. O'Fria is begging for
02:17:49 24 help because her boyfriend had a seizure.

02:17:51 25 Alternative methods were available, as we

02:17:54 1 already discussed. And no reasonable officer, knowing the
02:17:57 2 circumstances, knowing that this was a medical call, knowing
02:18:00 3 that this was an epileptic, would have done what Sanford did.
02:18:03 4 And we think we can produce evidence sufficient to show that
02:18:06 5 based on his own report, based on expert testimony on what
02:18:10 6 police should have done under these circumstances, so on and
02:18:14 7 so forth.

02:18:15 8 Now, the qualified immunity analysis, in the motion
02:18:19 9 it contains kind of a synopsis of the law, but it only seeks
02:18:23 10 qualified immunity analysis under one of the claims, which was
02:18:26 11 the excessive force claim.

02:18:29 12 Now, excessive force claims are factored in
02:18:34 13 inquiries. They -- every one is going to be completely
02:18:37 14 different because every situation is completely different.
02:18:39 15 The Court has general principals to guide it, but there's no
02:18:42 16 question that the right to be free from excessive force is
02:18:45 17 well-established at the time of the arrest. And because
02:18:49 18 Sanford knew O'Doan was epileptic, he could not have believed
02:18:56 19 his conduct was consistent with O'Doan's rights. I don't
02:19:00 20 think there's anybody who thinks it's okay to Judo throw a
02:19:04 21 sick person. But, that's the actual circumstance that Sanford
02:19:09 22 was facing.

02:19:10 23 The City argues that Sanford and Leavitt had
02:19:15 24 probable cause to arrest O'Doan. Well, under the totality
02:19:19 25 of the circumstances known to Sanford and Leavitt, a prudent

02:19:22 1 person wouldn't have arrested him. They arrested this guy
02:19:25 2 when he was in his hospital gown, at Renown, after an ER
02:19:29 3 doctor said he had a seizure, wearing a hospital bracelet.
02:19:33 4 They completely ignored what -- you know, this bizarre
02:19:38 5 situation. Okay? What's the cause of this? They don't even
02:19:41 6 address any cause in the report, just the fact that he was
02:19:43 7 naked walking on the street.

02:19:45 8 They state in the motion that it was more
02:19:52 9 consistent with drug use. Well, there's no evidence that
02:19:54 10 he was on drugs. There is evidence that he had a seizure.
02:19:57 11 He's postictal. That's why the whole call happened.

02:20:00 12 It's incredibly infuriating to a person with a
02:20:04 13 sickness like this, to explain facts and circumstances that --
02:20:08 14 where their behavior is odd, and to not be believed for no
02:20:13 15 reason, without good cause at all. And, to be arrested for it
02:20:16 16 is much, much, much worse. It's very harmful.

02:20:20 17 Now the central fact in this case is that he had
02:20:25 18 epilepsy and he had had a seizure. And that's what all of
02:20:28 19 this -- all of the evidence is going to show here. And
02:20:32 20 Sanford and Leavitt were deliberately indifferent and showed
02:20:36 21 a reckless disregard for this fact and for the truth. And
02:20:40 22 there is a whole bunch of cases under the Devereaux v. Abbey
02:20:46 23 line of case in the Ninth Circuit, and the Hale v. Fish case
02:20:50 24 in the Fifth Circuit, which we cited, where you can show a
02:20:54 25 constitutional violation by showing an affidavit supporting

02:20:56 1 arrest wherein it contained critical omissions that would have
02:21:00 2 negated probable cause.

02:21:02 3 Well, the justice court judge who determined that
02:21:06 4 there was probable cause was not apprised of the facts in this
02:21:09 5 case. Had he been apprised that, okay, the call was about
02:21:13 6 epilepsy. The police were informed that this call was about
02:21:16 7 epilepsy before they encountered him. They took him to the
02:21:20 8 hospital. He was diagnosed with having had a seizure. Okay?
02:21:23 9 If those facts were known to a judge trying to determine
02:21:27 10 probable cause in this case, the likelihood that probable
02:21:30 11 cause would have been found is minimal, in my humble opinion.

02:21:34 12 The City argues that Sanford and Leavitt's actions
02:21:38 13 were proper and justified and, therefore, we don't have an
02:21:42 14 assault and battery claim. If what we prove about the
02:21:45 15 constitutional violation is true, then the use of force was
02:21:48 16 unlawful. And, we do have such a claim against Sanford. And,
02:21:52 17 the same basic analysis applies to the false arrest and false
02:21:55 18 imprisonment claims. I mean, if there's no legal cause and
02:21:58 19 justification, if the arrest was in violation of Mr. O'Doan's
02:22:02 20 constitutional rights, and was without reasonable cause, then
02:22:05 21 those claims are valid.

02:22:07 22 And I would be glad to answer any questions you
02:22:10 23 have, Your Honor.

02:22:10 24 THE COURT: All right. No. I don't have any
02:22:11 25 questions. Thank you very much, Mr. Busby.

02:22:15 1 Mr. Hughs.

02:22:16 2 MR. HUGHS: Thank you, Your Honor.

02:22:19 3 Your Honor, I'm very glad the Court asked what
02:22:23 4 should the police officers have done because we've been
02:22:26 5 asking that. We asked it in discovery. The response was
02:22:28 6 we don't have to tell you. And that's really been a problem
02:22:31 7 for us in this case.

02:22:32 8 MR. BUSBY: I object, Your Honor. Discovery
02:22:35 9 is continuing. We've provided documents from the Epilepsy
02:22:38 10 Foundation which show what should have been done. We're
02:22:41 11 going to provide an expert who is going to explain what should
02:22:44 12 have been done.

02:22:45 13 THE COURT: Okay.

02:22:45 14 MR. HUGHS: With that being said, I think a lot
02:22:47 15 of Mr. Busby's argument strays from the 12(b)(6) inquiry,
02:22:54 16 which is all we're concerned with here today, and can be
02:22:56 17 concerned with.

02:22:57 18 Your Honor, the motion was -- and I, probably, in
02:23:04 19 hindsight, would do it a little differently, but the motion
02:23:06 20 was supposed to be a roadmap showing this is when the police
02:23:10 21 first heard the call and this is what they knew. And that's
02:23:13 22 why on page 3 of the Motion to Dismiss, which is document 10,
02:23:16 23 at line 3, I indicate that it was at 6:55 that the police
02:23:22 24 officers were first called. And that's important because the
02:23:26 25 audio was -- the audio tapes, the various ones I've provided

02:23:32 1 to the Court, were to show the Court the context of what was
02:23:36 2 going on at the time the police were called. But, what the
02:23:40 3 police heard only began at 6:55. And then in the call log,
02:23:45 4 which is Exhibit 5 of the motion, you can see where -- or
02:23:52 5 18:55:35, that's where the police first receive their call
02:23:58 6 and, at that point, they were getting a call about someone who
02:24:01 7 was naked, epileptic, trying to break out windows and hurt
02:24:05 8 himself. Someone who was uncooperative and violent. That's
02:24:09 9 what the police knew, and that's why they acted appropriately
02:24:13 10 under the circumstances.

02:24:14 11 What, I think, is happened here, in the opposition
02:24:17 12 argument in this hearing, is there's been a lot of discussion
02:24:19 13 about things that aren't in the record, aren't in the
02:24:22 14 Complaint, aren't in any of the exhibits. It's a lot of
02:24:26 15 what the plaintiffs want to put forth as a case. But, we're
02:24:29 16 here to test the sufficiency of the Complaint. And so that's
02:24:33 17 what the motion attempts to do, is say you can take these
02:24:37 18 judicially noticeable bits of information, you can look at
02:24:42 19 the Complaint, look at our argument and understand that,
02:24:46 20 under the circumstances, these claims aren't cognizable, that
02:24:52 21 under the test, under the Ashcroft test, under the test under
02:24:56 22 Rule 12(b)(6), they don't pass muster.

02:25:00 23 There's only a few things I want to address, just
02:25:06 24 quickly. The paraplegic argument, I think is a false argument
02:25:11 25 here. The problem is we have a naked man, who nobody knew

02:25:15 1 what was going on with him, the police officers didn't know
02:25:18 2 what was going on with him, going down a street, and they were
02:25:20 3 called to assist because he was violent and uncooperative.
02:25:24 4 When you argue this is the same as shooting a paraplegic,
02:25:27 5 no it's not, because it's pretty obvious when someone is a
02:25:31 6 paraplegic, if they are disabled or, for instance, in a
02:25:35 7 wheelchair or something like that.

02:25:37 8 There's no indication here. The police had to go
02:25:40 9 with what they knew at the time. And that's the Graham v.
02:25:42 10 Conner test. What they knew at the time. No Monday morning
02:25:47 11 quarterbacking.

02:25:48 12 With regard to the whole Sheehan discussion, the
02:25:52 13 only point the City is trying to make with regard to Title II
02:25:55 14 with regard to the American's with Disabilities Act, is
02:26:02 15 that, whether it applies or not, there is case law out
02:26:05 16 there, including in Sheehan, that says under the appropriate
02:26:09 17 circumstances, you can still arrest a person with a
02:26:13 18 disability. In other words, a disability isn't a shield
02:26:15 19 from arrest under ADA. That's what -- the point that the
02:26:19 20 City is trying to make.

02:26:20 21 As far as the finding probable cause in the justice
02:26:30 22 court, Your Honor, that does have issue preclusive effect.
02:26:35 23 That was a hearing before another court. This court, this
02:26:41 24 district does not get to re-decide that issue. That's issue
02:26:44 25 preclusion. He was -- Mr. O'Doan had his chance in court at

02:26:48 1 that time, and the Court could make as much of an inquiry as
02:26:53 2 it felt was appropriate, but there was a finding of probable
02:26:56 3 cause and, under those circumstances, certain claims just
02:26:59 4 can't exist.

02:26:59 5 MR. BUSBY: Your Honor -- I'm sorry, Mr. Hughs.

02:27:02 6 Just for the record I would like to object, once
02:27:04 7 again, to that line of argument.

02:27:06 8 MR. HUGHS: Okay. Well, it's a legal argument.
02:27:08 9 It's a legal argument. And so that's in the record, that the
02:27:13 10 Court found probable cause. Five Star is the seminal case
02:27:18 11 in Nevada indicating what the issue preclusion test is. The
02:27:22 12 issue preclusion -- the federal courts look to the State tests
02:27:27 13 for how issue preclusion is applied. And so, in this case,
02:27:30 14 issue preclusion is applied because another court has already
02:27:36 15 decided this issue and it can't be decided again.

02:27:39 16 It would be akin to, for instance, Your Honor, a
02:27:42 17 coerced confession claim, when, in fact, somebody had already
02:27:47 18 been tried in state court and that court had already gone
02:27:50 19 through a whole hearing and a whole decision as to whether a
02:27:54 20 confession was coerced and decided it wasn't. You can't then
02:27:57 21 have a federal court decide that issue again. And there's a
02:28:01 22 whole line of authority regarding that.

02:28:05 23 So with that being said -- I'll just keep it
02:28:08 24 short -- we believe qualified immunity applies. We believe
02:28:12 25 that under the facts and circumstances, the civil rights and

02:28:16 1 state tort claims can't be upheld, especially where there
02:28:20 2 was a finding of probable cause, and we don't believe the
02:28:23 3 allegations that, merely that Mr. O'Doan was arrested is
02:28:26 4 enough to support the ADA claim.

02:28:28 5 Thank you.

02:28:35 6 THE COURT: All right. Well, I'll give you a
02:28:39 7 decision on this soon. As I said, I'm still very troubled
02:28:44 8 over -- and we're really arguing the merits of the case much
02:28:48 9 more than the 12(b)(6) issues that require the Court to
02:28:53 10 accept as true the well-pled allegations of the Complaint.
02:28:59 11 But, nonetheless, these issues are issues which are going
02:29:03 12 to be in front of this court, and so I appreciate, until a
02:29:07 13 resolution is finally made, either for defense or plaintiff,
02:29:12 14 so I appreciate the argument and the presentation.

02:29:16 15 I don't have any problem saying that Graham
02:29:22 16 certainly stands for the proposition that you have to go
02:29:26 17 by the reasonableness of the officer's conduct at the time
02:29:28 18 that that conduct occurs, rather than in hindsight. And I'm
02:29:35 19 troubled over the fact that -- I mean, I can tell you I've
02:29:40 20 been dealing with drug cases for the last two or three weeks,
02:29:44 21 and these kind of symptoms; disorientation and people not
02:29:53 22 responding to commands of other people, of law enforcement
02:29:59 23 in particular, and sometimes the destruction of property,
02:30:02 24 threats, et cetera, these are all so, classically, symptoms of
02:30:06 25 drug use and abuse. And I'm not suggesting, in any way, that

02:30:10 1 Mr. O'Doan was using some kind of drugs. What I'm saying is
02:30:15 2 if you look at it from the police officer's standpoint, and
02:30:18 3 you have someone walking down a street in broad daylight,
02:30:22 4 nude, not responding to commands, appearing, at times, to be
02:30:27 5 hostile toward those people who may be trying to assist him
02:30:31 6 at the scene, if the officers -- and, very significant to the
02:30:42 7 Court, Mr. O'Doan is out in the public. He's not in his home.
02:30:46 8 He's not locked in a bedroom. He's not locked in a bathroom.
02:30:50 9 He's not in a confined quarters. He's out in the public.
02:30:54 10 And, one, people are being exposed. And certainly in broad
02:31:01 11 daylight, I certainly believe that there would have been
02:31:07 12 members of the public, which would have included children,
02:31:10 13 who could have been exposed somehow to Mr. O'Doan through no
02:31:15 14 fault of anyone. But, the fact is that that's something that
02:31:18 15 the police have to be concerned about. And, the fact that
02:31:25 16 this person could have just turned and walked out into the
02:31:29 17 traffic on the street, that he could have had some kind of
02:31:35 18 disability in dealing with the confrontation that would have
02:31:38 19 caused him to do something that could exacerbate the entire
02:31:43 20 situation, which may have called upon the officers to use
02:31:46 21 greater force than was used, it just -- I'm troubled over
02:31:54 22 what the officers could do here. But, I do recognize the
02:31:57 23 plaintiff's argument that perhaps some ADA training would
02:32:00 24 have helped. But, the either side of that coin is that a
02:32:05 25 postictal state, I've had some exposure to those over my years

02:32:10 1 of experience, and they deal with people who are in varying
02:32:13 2 levels of mental recovery. It usually starts with confusion
02:32:19 3 and then, sometimes, there's no sense of what they're doing or
02:32:22 4 how they're doing it, and then slowly evolves to a situation
02:32:27 5 where they do have some awareness. And ultimately, and
02:32:30 6 hopefully, resolves in a situation where they come back to
02:32:33 7 normal.

02:32:34 8 But, how are the officers to know what the level is
02:32:38 9 of the state at the time?

02:32:41 10 I mean hindsight might help, but it might not. But
02:32:46 11 at the scene at the time, recognizing everything that's going
02:32:49 12 on here, it strikes me that people would have a hard time
02:33:02 13 describing what else the officers could do than what they did.

02:33:09 14 I'll give you a ruling, but I suspect that I'm
02:33:16 15 really going to have to see and hear the evidence rather than
02:33:19 16 just -- I appreciate counsel's representations concerning
02:33:24 17 what happened. I recognize that both of you have been very
02:33:29 18 forthright with me. But, the fact is I need evidence to
02:33:33 19 decide this case on the merits and I don't have that at this
02:33:40 20 stage in the proceedings. And yet, I recognize that it's in
02:33:43 21 everybody's interest to attempt to reach some resolution of
02:33:48 22 this within a reasonable amount of time.

02:33:51 23 So, I will get back to you as quickly as I can. And
02:33:56 24 I thank you for your arguments.

02:33:58 25 Court will be adjourned.

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(Court Adjourned.)

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I certify that the foregoing is a correct
transcript from the record of proceedings
in the above-entitled matter.

\s\ Kathryn M. French

January 11, 2018

KATHRYN M. FRENCH, RPR, CCR
Official Reporter

DATE